Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENNETH S. BENIGNI,

Petitioner,

v.

COWLES MEDIA COMPANY, a Delaware corporation, d/b/a STAR TRIBUNE, LARRY OAKES, and MICHAEL HART,

Respondents.

ON WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

KENNETH S. BENIGNI
PETITIONER pro se
7485 Kauppi Lake Rd.
Cotton Minnesota 55724
Tel: (None)

143 P

QUESTIONS PRESENTED

1. May the media use its First Amendment right to freedom of the press to suppress a citizen's First Amendment right to freedom of speech without losing the protection of the New York Times privilege?

2. If media defendants have lost the protection of the New York Times privilege through the abuse of the purpose for which that privilege was given, does the action become subject to common law standards whereby the burden of proof shifts to the defendants to prove the truth of their defamatory statements, rather than it being on the plaintiff to prove the falsity of the defamatory statements?

3. May a plaintiff, claiming to be a private figure, be held to public figure standards of proof without the court ever ruling on his status as a: private figure; public figure for all purposes; limited purpose public figure and; if such, in relation to which specific matters and; whether those matters are of public concern and; whether he was even subject to the burden of persuasion if the media defendants had lost the protection of the New York Times privilege through the abuse of the purpose for which that privilege was given?

4. Did the lower courts err, or violate Petitioner's rights by denying him equal protection of the laws by:

a. holding that the article was not defamatory when the record showed ample

evidence to the contrary and the article was capable of a defamatory interpretation;

b. simply ignoring Petitioner's motion to compel discovery whereby media defendants escaped without producing documents and evaded answering interrogatories;

c. granting Defendants' motions for summary judgment when there were several genuine issues of material facts precluding summary judgment;

d. granting Defendants' motions for summary judgment before Petitioner had adequate time for discovery?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Kenneth S. Benigni, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Minnesota Court of Appeals in the above-entitled case on April 26, 1994.

OPINIONS BELOW

The order of the Minnesota Supreme Court denying Appellants petition for review appears in the appendix at 1a.

The opinion of the Minnesota Court of Appeals is unreported and appears in the appendix at 3a.

The order denying Respondents' motion to dismiss appeal appears in the appendix at 16a.

The order of the District Court appears in the appendix at 22a.

The judgment of the District Court appears in the appendix at 51a.

The District Court order denying Plaintiff's motion for reconsideration/ rehearing appears in the appendix at 54a.

JURISDICTION

The decision of the Minnesota Court of Appeals was filed on April 26,1994. A timely petition for review to the Minnesota Supreme Court was denied on June 15,1994. This Court's jurisdiction is invoked pursuant to U.S.C. 28, sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner Kenneth S. Benigni is the owner of a farm in Cotton, Minnesota, and from 1970 until 1984 raised animals, other than dogs and cats, for the pet trade. Respondent Michael Hart is member of the St. Louis County Sheriff's Department. Respondent Cowles Media Company is a Delaware corporation, doing business as Star Tribune. Respondent Larry Oakes is a reporter for Star Tribune.

In about 1982, Petitioner started converting his facility to a donation-only or free to the public roadside zoo. Because drunk and reckless drivers posed a danger to him or potentional visitors to his yet unopened zoo, and because complaints to the sheriff's dept. had brought no relief, about 1986, Petitioner erected a sign along the highway addressing the problem, hoping to spur the

sheriff into action. During 1986, Petitioner also provided Respondent Hart with movies of nearly 100 vehicles, along with simultaneously taken photos of the driver and license plate number, plus the dates and times, running the stop sign at the divided highway adjacent to his property. At that time, Petitioner also provided Hart with photographic evidence of extensive amounts of gravel stolen from his property including pictures of the tractor loader, belonging to Theodore Thomas Tammaro (one of several aliases) still at the theft site. The sheriff's dept. did not even bother to look at the theft site. In 1988, Petitioner provided Respondent Hart (Hart) and the St. Louis County Attorney's Office photographs of Theodore and Todd Tammaro stealing tandem dump truck loads of gravel from Petitioner's property. Petitioner also advised

Hart and the county attorney's office that he had simultaneously taken movies showing the crimes in progress, and which clearly identified the Tammaro's, their truck and new, bigger loader, and showed truckload after truckload of gravel being stolen. Neither the sheriff's dept. nor the county attorney's office would act or even look at the crime scene or movies.

During the 1980s, Petitioner also worked at his trade in construction in several states and was cheated out of his wages on 7 occasions, by 7 different employers, 2 of which were in the Minneapolis, Minnesota area. Although Petitioner eventually recovered most of the wages through his legal efforts and actions, the cost of recovery exceeded the recovery. During 1988, Petitioner wrote and copyrighted a highly documented 3 part manuscript entitled " Odyssey to Justice",

which related to wage thefts, the thefts of his property in St. Louis Co., and the problem of prosecutors who won't prosecute.He offered it for sale to only the two Twin City newspapers. They, however, declined to buy it.

During 1989, Star Tribune published several highly anti-union articles relating to a strike/riot at a Boise Cascade (a major supplier of newsprint for Star Tribune) paper mill construction site in International Falls, Minnesota. Three of these articles were written by Respondent Larry Oakes (Oakes). Star Tribune also published other anti-unions in general articles or cartoons,and one urging the use of the National Guard to subdue the strikers. As an uninvolved union member, Petitioner was offended at being equated with the Mafia and responded to these attacks by erecting a sign

which said: "End news media bias, hypocrisy and propaganda. For ten years the news media has cheered Solidarity and the union strikers in Poland, called them heroes and freedom fighters, denounced military and Russian intervention. Now, the media calls American strikers terrorists, screams for National Guard to beat them into submission, won't print truth, including my copy-righted articles exposing extensive wage thefts in non union construction." (capitalized in original). Prior to the above indicated signs, Petitioner had erected two totally insignificant signs which simply read: "Good Riddance" and "Ford is just a four letter word". (capitals in originals)

In the spring of 1990, Petitioner found the business card of Star Tribune reporter Larry Oakes lying near his mail box. It included the hand written message:

"Call me, Collect if you wish". Petitioner did not call Oakes until late summer of 1990 after his mail service had been terminated for six weeks on the pretext of bees in his mail box and left the no mail-no bee information on Oakes' answering machine. Oakes did not respond. Meanwhile, a television station ran the non-existent bee story. Weeks later, Oakes came to Petitioner's home. Petitioner and Oakes exchanged casual greetings and introductions. Petitioner told Oakes he was late for the non-existent bee story. Oakes said that he thought Petitioner was more interesting. Petitioner made it clear that he was not interested in talking about himself but only about the matters addressed on his signs and his nearly completed zoo. Petitioner invited Oakes into his house, which had been remodeled and was surrounded by over forty tubs of

flowers in bloom. The modest house was sided with hand-split shakes and included a greenhouse which was also filled with flowers in bloom. Petitioner invited Oakes inside to look at his evidence and exhibits. As he turned to his side he told Oakes not to worry about the gun in his back pocket (which was not visible until Petitioner turned around to lead Oakes into his house), and that he carried it because he had received a death threat recently (which had been witnessed by another person who had provided a witness statement to the sheriff's dept.) from another thief of county property whose apprehension was caused by Petitioner's timely call to the sheriff's dept. notifying them of the theft in progress, although he was never charged with either the theft of county property or making the

death threat. Once inside, Petitioner showed Oakes the same pictorial evidence of the gravel thefts from him and from the county which he had presented to the county attorney's office and sheriff's dept.Petitioner showed Oakes pictorial exhibits of reckless driving, which was a minor matter in relation to the extensive and on-going gravel thefts, which by this time totaled about 8,000 cubic yards. at a replacement value of $10 per cubic yard. Petitioner advised Oakes that he had movies of the gravel thefts in progress identifying the Tammaros and their equipment; and also the movies and ancillary photographs of the nearly one hundred vehicles running the stop sign.at the divided highway. Petitioner told Oakes the details of the witnessed death threat he had received from the thief who was concealed when he made the threat.

Petitioner showed Oakes the print-out of Theodore Tammaro's civil file, obtained from the St. Louis Co. Court Administrator, which showed Tammaro had been the defendant in forty seven civil cases during a seven year period, while the criminal files of the Tammaros were virtually bare, aside from dismissals of theft charges on the motions of county attorneys. Petitioner showed Oakes composite photographs of over 20 junk vehicles, including semi tractors and other trucks (now totaling 45) which the Tammaro's had dumped on Petitioner's land; and pictures of dump truck loads of rubbish they had dumped there. He showed Oakes pictures of the earthen barricade the Tammaros had bulldozed accross Petitioner's road on his property to prevent his access to his own land. He showed Oakes government aerial survey photographs which showed the theft

and dump sites were on his land. All of Petioner's photographic exhibits showed points of reference and included dates of occurrence. Petitioner showed Oakes witness statements concerning the thefts and cover-ups of other crimes by the sheriff's dept., but Oakes never read those. Petitioner loaned Oakes a copy of his manuscript "Odyssey to Justice" which also detailed the wage and gravel thefts. Petitioner showed Oakes letters from the author of the rule change in the Endangered Species Act, which was erroneously applied to Petitioner's wolves, which clearly confirmed that Petitioner's hybrid wolves had never been covered by the Act; and therefore Petitioner had never been in violation of the Endangered Species Act. Petitioner showed Oakes examples of civil cases he had won in relation to the thefts of his wages and told Oakes of other instances

where he had collected his wages through other legal procedures. He told Oakes that two actions he had brought regarding wage thefts were to be heard in a matter of days and showed him documents confirming the trial dates. Oakes never bothered to find out if Petitioner prevailed in those actions (which he did) before he published the article at issue. Oakes never bothered to look at the gravel theft sites, the dumped vehicles, the truckloads of dumped rubbish or the barricade; although he was only 1/4 mile away from the sites.

On September 4, 1990, Star Tribune published the article entitled " He's a northern Minnesota rebel with a lot of causes", written by Larry Oakes. (reproduced in District Court's decision, Petitioner's Appendix (Ap.) at 24a). On Sept. 2, 1992, Petitioner, as plaintiff,

brought an action against Respondents in the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota. On April 7, 1993, media Respondents brought a motion for summary judgment. On May 5, 1993, Respondent Hart also brought a motion for summary judgment. Both motions were heard before the Honorable Harvey C. Ginsberg on June 4, 1993. In his response brief, in the General Statement, Petitioner raised the issue of the media Defendants being willing to freeze to death the people's First Amendment right to freedom of speech through reprisals (character assassinations) if the citizen criticized them or public officials; or merely reported law violations to the police. (Ap. at 61a) At the June 4, 1993 motion hearing, Hart's attorney argued that the standard of fault should be actual malice. In his brief, Petitioner

pointed out that he was a private figure; that his signs did not make him a public figure; that Hart was not a media defendant; and that Hart was at the very least neligent. (Ap. at 83a,84a) The District Court never addressed these issues.

During discovery Petitioner provided media Defendants with large amounts of requested documents from which they ultimately fabricated stories to try to support their defense of truth. The media Defendants misquoted portions of his deposition as well as some of his signs. They included "up to the minute" signs which were erected years after the article was published, along with irrelevant events which also occurred years after the article was published, attempting to convert Petitioner into a public figure. Meanwhile, media Defendants refused to produce one shred of documents, and evaded answering

Petitioner's interrogatories. Petitioner brought a motion to compel discovery, however, the District Court never ruled on Petitioner's motion to compel discovery and media Defendants were allowed to escape without producing one shred of documents. The District Court concluded, after a line by line analysis that the article was not defamatory and granted Defendants' motions for summary judgment. (Ap. at 22a - 53a) Petitioner had argued in his response that the defamatory character of a particular statement must be construed in the context of the article as a whole.

On Sept 14, 1993, Petitioner brought a motion to vacate or amend order, order a new hearing on all the issues, or in the alternative, for relief from judgment. In his argument, Petitioner raised the issues of his being a private figure and;

that concealing crime and corruption, and discrediting an honest witness were not matters of public interest; thus he was only required to prove negligence, not actual malice; that the article was abuse of media power against a citizen using his freedom of speech in self defense to obtain law enforcement and justice; that the New York Times privilege was not given to the media to aid and abet crime, dereliction of duty of public officials, or to suppress the disclosure of evidence by assassinating the character and credibility of a crime witness; or to prevent citizens from obtaining law enforcement, their wages, or relief from death threats; or to retaliate against a citizen for using his freedom of speech; or to rule the people by the threat of character assassination if they dared make a comment the media or

or authorities did not like. Petitioner pointed out that two factors distinguished this case from all the others: No.1 Here the media was helping criminals to continue their criminal activities. No.2 Here the media was using its First Amendment right of freedom of the press to suppress a citizen's right of freedom of speech. (Ap. at 62a - 65a) The District Court did not address these issues and denied the motion. (Ap. at 54a - 59a)

On December 1, 1993, Petitioner filed and served Defendants a timely notice of appeal. In the statement of the case in that notice, Petitioner again raised the issues that: The article's purpose was to silence Petitioner and suppress his evidence of crime and corruption by discrediting both. essentially to suppress his First Amendment right of freedom of speech with the media's First Amendment

right of freedom of the press.(Ap. at 66a).

On December 13, 1993, media Defendants filed a "clarification" of Petitioner's statement of the case which stated that Petitioner had not been held to be private figure for purposes of applying the appropriate fault standard. (Ap. at 67a).

On January 14, 1994, media Defendants brought a motion to dismiss Petitioner's appeal. On January 19, 1994, Defendant Hart brought a similar motion to dismiss. On January 25, 1994, Petitioner filed and served his reply brief. On January 31, 1994, the Minnesota Court of Appeals denied the Defendants' motions to dismiss. (Ap. at 16a - 21a)

In his Appellant's brief, Petitioner again raised the issues that the purpose of the article was intended to silence

him and suppress his evidence of crime and corruption, and to suppress his freedom of speech with the media's freedom of the press, which flew in the face of the New York Times privilege. (Ap. at 67a, 68a). Petitioner again raised the issues that he was a private figure; that the discrediting of a crime witness and his evidence was the antithesis of public concern; that Petitioner was not a matter of public concern and; that Petitioner was only required to prove negligence. (Ap. at 67a - 71a)

In their response brief the media Defendants/Respondents argued/admitted that the article was not about gravel thefts and traffic violations in Cotton, Minnesota; that the article was about Petitioner. They also argued that: "the validity of Appellant's evidence is not the point", "Whether Appellant's evidence

is "valid and solid" makes no difference to this, the article's main subject.... the readers' impressions of Mr. Benigni will be influenced far less by the truth or falsity of Mr. Tommaro's gravel-stealing than by Mr. Benigni's unusual efforts to bring this man and his associates to justice." and that: "Appellant's 'evidence' makes no difference to this gist, because the gist would not change in the mind of the average reader even if it could be determined that Appellant's evidence is 'valid and solid'." (Ap. at 72a - 75a). At this time, media Defendants began to glorify criminals by referring to the thief Theodore Tammaro as Appellant's "nemesis"; which, considering the definition of nemesis is "just punishment", "retribution" and "one who imposes retribution", clearly implies that they belived that Tammaro was per-

fectly justified in committing his crimes against Petitioner, and that Tammaro was an avenging angel, while Petitioner was the villan for exposing Tammaro's crimes. (Ap. at 73a). Media Respondents further argued that they brought their motion for summary judgment on the basis of truth and that thus, the issue of Appellant's/Petitioner's private figure status was not properly before the court. (Ap. at 75a, 76a). Defendant Hart, however, never limited his defense to truth, especially since Hart admitted in his affidavit that his statements in paragraph 21 of the article were false. (Ap. at 85a). Hart's attorney also argued at the June 4, 1993 motion hearing that the standard should be actual malice. (Ap. at 83a).

On February 17, 1994, media Respondents sent a letter, which was circulated to the judges of the Minnesota Court of

Appeals, in which they raised the issue of privilege. (Ap. at 76a - 77a)

On February 24, 1994, Petitioner submitted his reply brief and again raised the issue that the actions of the media Defendants, in attempting to, or in actually suppressing his freedom of speech for his reporting and advising of crimes and corruption, was antithetical to the principle upon which the New York Times rule/privilege was founded and: that the abuse of the purpose for which the privilege was given would result in the loss of that privilege, the action would revert back to common law standards, and the burden of persuasion would be on the media Defendants to prove the truth of their statements rather than on the Plaintiff/Petitioner to prove the falsity of the statements at issue. (Ap.

at 77a - 82a).

The Minnesota Court of Appeals by passed all of the issues, affidavits and exhibits and held that the article, in whole or in part, was not defamatory. That: the article was a "human interest" peice which portrayed Appellant as "an opinionated individual with rather strident views on various political and social issues," "which he expresses in unusual ways", "engaging in unfettered expressions" " as an active participant in public issues", which implied Petitioner was held to public figure standards of proof of falsity. The court further held that there was no err in the District Court ignoring Petitioner's motion to compel discovery. The District Court's judgment was affirmed. (Ap. at 3a - 15a)

Petitioner filed a timely petition for review to the Minnesota Supreme Court

and again raised the issue that the media Defendants had lost their privilege under the New York Times rule by the abuse of the purpose of that privilege. (Ap. at 82a). The Minnesota Supreme Court denied Petitioner's petition for review. (Ap. at 1a).

REASONS FOR GRANTING WRIT

From a logical perspective, the First Amendment right of freedom of the press had to have been based on the principle that it was the right of the people to be informed of matters that matter. As such, it is a right that belongs to the people. It could not have been intended that freedom of the press was to be the exclusive personal property of the media to do with as they pleased. Freedom of the press does not give the media the inherent right to destroy lives,

or careers, or livelihoods at its pleasure. It does not give the media the right to deliberately and falsely assassinate the character and credibility of a crime witness with the full knowledge that he is in possession of valid and material evidence concerning the crime. The people are not the media's chattel.

Balance is everything. In order for one to publish the news, one must first be provided with the news. It only follows that if citizens become silent, for fear of reprisals, no news will be provided to the media for it to publish, aside from its own personal opinions. In this respect, freedom of the press is subject to freedom of speech. The desire of the news media to dominate the freedom of speech is not only counterproductive to the interests of freedom of speech, it is at the same time self destructive. In

essence; no speech -- no press.

Without any question, this Court has rightly been concerned about the "chilling effect" large libel action awards would have on the media's incentive to report on or criticize public officials or expose crime and corruption. However, the "sacred cow" status that the media has now attained, along with its inherent power to destroy the life, career, or livelihood of anyone it wishes to destroy, now has the "chilling effect" on the citizens' freedom of speech. Faced with the threat and reality of a vicious character assassination if they dare use their freedom of speech to criticize the government or media, or the media's friends, the citizens may well choose to remain silent rather than report or disclose the existence of crime or corruption realizing the risk they face. Thus, either way,

when the elusive balance favors either side too much, there is a "chilling effect" on the free flow of information; and on the freedom of speech itself and; the people have a right to be heard. Thus, this Court's concerns of tipping the balance too much in the media's favor are realized in this case.

I. THE MEDIA RESPONDENTS HAVE LOST THEIR PRIVILEGE UNDER THE NEW YORK TIMES RULE BY THE ABUSE OF THE PURPOSE FOR WHICH THAT PRIVILEGE WAS GIVEN.

The media Respondents' character assassination of Petitioner in the article at issue for his reporting and advising of crimes and corruption was antithetical to the principle upon which the New York Times rule/privilege was founded. In New York Times v. Sullivan, 376 U.S. 254, this Court said: "Thus we consider this case against the background of a profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The necessity of uninhibited, robust, and wide-open speech to the interest of a free society has been stressed many times by this Court, including in, Gertz v. Robert Welch, Inc., 418 U.S. 323 at 340, and Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 at 783, n.3.

If crime and corruption are public issues and, the New York Times rule/privilege was provided to the media for the purpose of assuring that debate on public issues should be uninhibited, robust and wide-open, then it logically follows that any effort by any member of the news media to suppress, inhibit, or interfere with any debate or any person's speech on

public issues (regardless of whether they are also his personal issues, or whether anyone is listening to him or not) is antithetical to the purpose of the New York Times privilege. The privilege is therefore abused, and therefore lost. Lost before the matter of proving that the defamatory statement was made with knowledge of its falsity or with reckless disregard of whether it was true or not is reached. The Restatement of the Law (Second) of Torts, section 603 states: One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given." Thus, the action becomes subject to common law standards whereby the bur-

den of proof shifts to the defendants to prove the truth of their defamatory statements, rather than the burden being on the plaintiff to prove the falsity of the defamatory statements.

Media Respondents made obvious attempts to, or did suppress, inhibit, or interfere with Petitioner's speech as spoken, or written on his signs, or otherwise advising of crime and corruption inter alia, in the article at issue. This would have the natural and proximate effect of suppressing, inhibiting or interfering with the debating of, or the investigation of his claims or accusations and the redress of his grievances. The article was not only a character assassination of Petitioner, but an assault on the principle that debate on public issues should be uninhibited, robust, and wide-open, and on all citizens' right to

freedom of speech. That policy was continued throughout their briefs. They, in fact, aided and abetted the commission of further criminal acts,(continuing up to this writing,including the logging off of Petitioner's trees in 1992,1993 and a majestic stand of hundred year old spruce in 1994 by Todd Tammaro, who also logged off additional persons' timber in 1994) by interfering with inhibiting Petitioner's attempts to secure law-enforcement. They were, in fact, accessories after the fact, and perhaps accessories before the fact, relative to criminal acts occurring after the article was published. (The sheriff's department now calls Petitioner's photographic evidence "excellent" but has still not made any arrests) Media Respondents have therefore abused the purpose of the New York Times privilege and have lost it

and the action becomes subject to common law standards whereby the burden of proof shifts to the Respondents to prove the truth of their defamatory statements, rather than it being on Petitioner to prove the falsity of the defamatory statements.

It is important to note the extreme contrast of the negative coverage Petitioner and his signs received in comparison to the consistently favorable and supportative coverage accorded to Margaret Gilleo and her sign, which was the subject of this Courts recent decision in Ladue, Missouri v. Gilleo, --- U.S. ---.

The obvious injustice that results when the wrath of the media and agencies entrusted with enforcing the laws is brought down on the honest and innocent citizen who sought only to protect his

life and property, or who performed a civic duty by reporting crimes, or complained about corruption, not only has a "chilling effect" on his speech, but a totally stunning and bewildering effect. His beliefs in the American values of truth, honesty and justice become blurred and questionable.

There is no Constitutional value in protecting criminals or corrupt or derelict public and government officials. It is ludicrous for Congress to appropriate billions of dollars for a "crime bill" if the media is going to protect or glorify criminals and assail the character and credibility of witnesses to crimes and disclose their identity and method of obtaining their evidence. When that happens, all responsible Americans lose. This is precisely the sort of irresponsible journalism that deserves a

"chilling effect".

II. PRIVATE FIGURE PETITIONER SHOULD NOT HAVE BEEN ARBITRARILY HELD TO PUBLIC FIGURE STANDARDS OF PROOF WITHOUT THE RESOLUTION OF HIS STATUS.

Petitioner was simply not a public figure as envisioned by this Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345. He was not at the vortex of any public controversies. Nor did he thrust himself to the forefront of a particular controversy in order to influence its resolution. He erected his few signs specifically because he did not have access to the media or to law-enforcement and was being subjected to continuing thefts of his property and death threats. It was an act of self defense. Two earlier signs merely expressed ambiguous opinions. One contained two words, the other seven. Two signs were in response to media Respondents' attacks on union

strikers and unions in general, one article likening them to protection racketeers. As a union member, albeit uninvolved, Petitioner was insulted and simply responded. Moreover, Petitioner did not become a public figure by reporting crimes or bringing civil actions to collect his wages.

The logical presumption should be that the plaintiff is a private figure until admitted or proven otherwise. To presume otherwise is to put the cart before the horse. Throughout this litigation, Petitioner consistently maintained he was a private figure. Media Respondents stated in their motion to dismiss that it was brought "primarily on the basis of truth" and would "not otherwise discuss the standard of fault applicable to this case". Respondent Hart, however, did not limit his motion to the defense

of truth, or any other defense, so the issues of fault and Petitioner's status as private or public figure were properly before the court.

Throughout the proceedings, Petitioner adamently maintained he was a private figure. Media Respondents vigorously disputed Petitioner's claim to private figure status. However, media Respondents never specified if he was alleged to be a public figure for all purposes, or a limited purpose public figure, and if such, in relation to which specific matters. The resolution of as to which specific topics Petitioner was to be considered a general or limited purpose figure for would be of critical importance since the article rummaged all through Petitioner's laundry. Additionally, media Respondents claimed in their "Brief of Respondents Star Tribune and

Larry Oakes" at p. 30 that "Appellant's criticisms cover a myraid of topics" (myraid is tentively defined as numbering 10,000 in Websters New Universal Unabridged Dictionary). The lower courts never ruled on Petitioner's status of private or public figure, The presumption should be that Petitioner is a private figure. Moreover, whether any of the "myraid" of topics or just those considered in the article were matters of public concern,as envisioned by this Court in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 at 768, was never addressed nor resolved by the lower courts. Respondent Hart was not a media defendant. Thus, under Hepps it was critical to determine if the defamatory matters were of public concern to require a showing of falsity rather than negligence. Thus, holding Petitioner to public

figure standards of proof without first determining his status of private or public figure, or which defamatory statements were of public concern, was error.

III. BY ERROR AND OMISSION, PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW.

The Minnesota Court of Appeals erred in reaching conclusions concerning Petitioner, his actions, his motives, and the nature of the article itself, which were wholly unsupported by the record. As a starting point, A "human interest" story would not be a vicious character assassination. It would not deliberately omit critical, material, and exculpable facts favorable to Petitioner, or that he had received a death threat from a thief of county property who was apprehended due to Petitioner reporting the theft in progress, or that he had movies of identified theives engaged in large scale thef-

ts of his property and official government aerial survey photographs showing numerous vehicles dumped on his land by the same theives. That is hard conclusive evidence, not an "opinionated" individual's "views on various political and social issues". Death threats are not "political and social issues". Petitioner was a witness to crimes, he was personally affected by the crimes. He reported the crimes to the sheriff's dept. and county attorney who protected the theives and permitted the crimes to continue for eight years to the present time.

Although relying heavily on Prosser and Keeton on Torts, (5th ed. 1984), the Court of Appeals lifts the phrase, defamation is generally "not concerned with the plaintiff's own humiliation, wrath or sorrow." cleanly out of context. Section 111 at p.771 deals with communication to

a third party being a requirement of defamation. That requirement was certainly met in the instant case. Moreover, Prosser and Keeton, supra, section 111 at p.781 and p.783 states:

> It is for the court in the first instance to determine whether the words are reasonably capable of a particular interpretation...it is then for the jury to say whether they were in fact so understood. If the language used is open to two meanings...it is for the jury to determine whether the defamatory sense was the one conveyed.
>
> ...it can be presumed that if the publication was ambiguous on its face and could be construed with two reasonadle meanings, some recipents would give it a defamatory construction.

The Minnesota Court of Appeals has misapplied the standard of review. It needed only to determine whether the words or article were reasonably capable of a defamatory interpretation. It went well beyond that basic concept and invaded the province of the jury.

The article is patently capable of being construed to be defamatory; and a jury should determine if it was so understood. The main sting of the article was that Petitioner only imagined that he had evidence of crime and corruption, that the evidence was worthless, That Petitioner was mentally ill or incompetent for thinking he had valid evidence. Without the key element, the evidence itself, there wouldn't have even been an article. Therefore, the test to prove whether the article is true or false, defamatory or not defamatory was to show whether the evidence is valid or not. If it is valid and solid, the gist of the article is false and defamatory.

It is false by the deliberate avoidance of truth, of critical predicate facts, as was the case in Harte-Hanks Communications, Inc. v. Connaughton,

491 U.S. 657 (1989) The similarities between the instant case and Harte-Hanks along with Curtis Publishing v. Butts, 338 U.S. 130 (1967) are striking. In Harte-Hanks, the publisher didn't listen to available audio tapes, In Butts the publisher didn't look at available movies. Here, the reporter didn't look at available movies, or even at acres of physical evidence, he disregarded the photographic exhibits and documents he was shown. The media Respondents produced no evidence of his conducting any sort of investigation aside from talking to Respondent Hart, and neither Respondent remembered what they discussed to any significant degree. Whether this purposeful avoidance of the truth amounted to actual malice was a genuine issue of mater fact and precluded summary judgment. Other issues of material fact included whether the

admitted false statement in paragraph 21 of the article was about Petitioner as he maintains, or not, as Respondent Hart maintains. Whether Petitioner's version of the meeting described in paragraph 4 of the article is more believable since it occurred 500 feet or so away from the signs, in Petioners driveway, Petitioner does not cock his head, it's impossible to see a gun in anybody's back pocket when they are facing you as Petitioner was facing Oakes. Petitioner produced 21 pages of Minnesota Dept. of Natural Resources disposal permit correspondence showing he was not stopped from selling wolves and continued to do so for years after the U.S. Fish and Wildlife matter, and letters from the author of the Endangered Species Act rule change confirming Petitioner was permitted to sell his hybrid wolves. Thus paragraph 7

was shown to be false, as was paragraph 9, shown by judgments to be false. Petitioner also had no failures as claimed in paragraph 14 of the article or before the times claimed therein. Moreover, the "haranguing prosecutors" in St. Paul and Duluth for hours never occurred because Petitioner didn't work in those towns. and no wage thefts occurred in those jurisdictions.

Insofar as innuendo is concerned, media Respondents admit in their response brief (Ap. at 74a) that the article does convey the defamatory gist that Petitioner is a "nut" or "fool" with "no credibility whatsoever". They add "that gist stems chiefly from the article's factual and demonstrably true portrayal of Appellant's own conduct." However, media Respondents <u>created</u> Petitioner's "own conduct". If the article had said that Petitioner

had captured on film nearly 100 stop sign "runners", while the sheriff's "strike force" couldn't even catch one,(according to paragraph 21 of the article) Petitioner might have appeared to have been extremely clever, resourceful and successful, especially in contrast to the sheriff's dismal performance. However, that true information was deliberately omitted to create the appearance of failure to prove that people were running the stop sign, aside from a few "roll-throughs". A reasonable reader might easily conclude that Petitioner was mentally incompetent and was imaginating these traffic violations. The concept is elementary; people cheer a winner, and laugh at a loser. Moreover, people have a picture in their minds of what constitutes a mentally incompetent or insane person. The article never said, in so many words, that Petit-

ioner was insane or mentally incompetent. The article instead was filled with false scenarios and suggestive words and phrases such as "wrongdoers of 'his world'", "Benigni Enemy No.1.", "No.2.", "No. 3." to paint a picture of a mentally incompetent person in the minds of the readers. The article was clearly capable of being defamatory by innuendo. Since it was a character assassination, why wouldn't it be successful? The reasonable reader could easily conclude the article did exactly that. No reasonable reader could come away from reading that character assassination without being negatively affected. The Minnesota Court of Appeals erred in concluding the article was not defamatory.

In relation to discovery err, ignoring Petitioner's motion to compel discovery was error. Not only did Petitio-

ner require the names of potentional persons to depose before be could depose them, he also needed information concerning the editing process. This Court held in Herbert v. Lando, 441 U.S.153 at 154:

> New York Times and its progeny do not suggest any First Amendment restriction on the sources from which the plaintiff can obtain the necessary evidence to prove the critical elements of his cause of action, but, on the contrary, make it essential to proving liability that the plaintiff focus on the defendant's conduct and state of mind.

Simply ignoring motions to compel discovery flies in the face of the purpose of the discovery rules. Moreover, the defendant can avoid discovery altogether if the court has such a lax attitude toward motions to compel discovery, additionally, such evasive tactics exhaust the plaintiff's time, resulting in insufficent time for adequate discovery as was the situation in the instant case.

as was the situation in the instant case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: September 13, 1994

Respectfully submitted,

Kenneth S. Benigni
Petitioner, pro se
7485 Kauppi Lake Rd.
Cotton, Minnesota 55724
Tel. (none)

STATE OF MINNESOTA

IN SUPREME COURT

C8-93-2434

OFFICE OF
APPELLATE
COURTS
JUN 15 1994
FILED

Kenneth S. Benigni,

Appellant,

vs.

Cowles Media Company, a Delaware corporation, d/b/a Star Tribune,

Respondent,

Michael Hart,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the peti-

tion of Kenneth S. Benigni for further review be, and the same is, denied.

Dated: June 15, 1994

BY THE COURT:

_____

Chief Justice

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. Sec. 480A.08, subd. 3 (1992)

STATE OF MINNESOTA

IN COURT OF APPEALS

C8-93-2434

Hennepin County Davies, Judge

District Court File No. 9216358

Kenneth S. Benigni,

Appellant,

Pro se
7485 Kauppi Lake Road
Cotton, MN 55724

vs.

Cowles Media Company,
a Deleware corporation,
d/b/a Star Tribune,

Respondent,

John P. Borger
Thomas P. Schroeder
Faegre & Benson
2200 Norwest Center
90 S. Seventh Street
Minneapolis, MN 55402-3901

Randy M. Lebedoff
Christine Caspers
Cowles Media Company
425 Portland Avenue
Minneapolis, MN 55488

Michael Hart,

Respondent.

Alan L. Mitchell
St. Louis County Attorney
Barbara A. Russ
Assistant County Attorney
100 N. 5th Avenue W., #501
Duluth, MN 55802-1298

Filed April 26, 1994
Office of Appellate Courts

Considered and decided by Davies, Presiding Judge, Short, Judge, and Klaphake, Judge.

UNPUBLISHED OPINION

DAVIES, Judge

Subject of newspaper article appeal-summary judgment on his defamation claim. We affirm.

FACTS

On September 4, 1990, respondent Cowles Media Company, d/b/a Star Tribune (Star Tribune), published a "human interest" story entitled, "He's a northern Minnesota rebel with a lot of causes." The story, written by respondent Larry Oakes, focused on the various political and social views of appellant Kenneth S. Benigni (as expressed on billboards he maintains on his property), and on his attempts to get satisfactory law enforcement. The story quoted respondent St. Louis County Sheriff Captain Michael Hart regarding appellant's attempts to ensure that the local authorities were enforcing the law.

Appellant filed a defamation suit against the Star Tribune, Oakes, and Captain Hart in September 1992. Respondents moved for summary judgment. The

district court granted summary judgment on August 30, 1993. Appellant moved to vacate the order on September 15, 1993. The court denied his motion and this appeal followed.

DECISION

On appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988).

I. Defamation

The elements of a cause of action for defamation are (1) the unprivileged communication to a third party, (2) with fault, (3) of a false statement, (4) that is defamatory. Britton v. Koep, 470 N.W.2d 518, 520 (Minn. 1991).

The district court engaged in a

paragraph-by-paragraph analysis of the article, concluding that the challenged statements were either (1) true or at least substantially true, (2) incapable of being proven true or false, (3) opinion, (4) metaphorical use of language ("rhetorical hyperbole"), or (5) not defamatory.

Whether a statement is defamatory is a question of law for the court. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, sec. 111 at 774 (5th ed. 1984). Similarly, where an indirect statement is not facially defamatory, whether the statement is reasonably capable of a defamatory interpretation is an issue of law for the court to decide in the first instance. Id. at 781. Only after the court decides that the statement could reasonably be interpret-

ed as defamatory does a jury issue arise as to whether the statement was actually understood in a defamatory manner. Id.

A defamatory statement is one that tends "to harm the plaintiff's reputation and to lower him or her in the estimation of the community." Lewis v. Equitable Life Assur. Soc'y of the U.S., 389 N.W.2d 876, 886 (Minn. 1986); accord Restatement (Second) of Torts sec. 559 (1977).

A reasonable person standard governs the interpretation of an allegedly defamatory statement:

> [W]ords are to be taken in the sense in which they are reasonably understood under the circumstances, and are to be presumed to have the meaning ordinarily attached to them by those familiar with the language used.

Keeton, et al., supra, sec. 111 at 781. The entire article must be construed as

a whole. Jadwin v. Minneapolis Star & Tribune Co., 390 N.W.2d 437, 443 (Minn. App. 1986). Thus, the plaintiff cannot base a defamation action on a single passage lifted out of context.

Appellant finds the article offensive. But whereas other torts, such as intentional infliction of emotional distress, focus solely on the plaintiff's subjective or emotional injury, defamation is generally "not concerned with the plaintiff's own humiliation, wrath or sorrow." Prosser & Keeton, supra, sec. 111 at 771. That the plaintiff finds the story unpleasant and offensive is not enough. Id. at 775. Rather, the story's impact on appellant's reputation in the community provides the measure of his claim of defamation. Lewis, 389 N.W.2d at 886.

Furthermore, appellant's displea-

sure with the article is unwarranted. Here, although some parts of the article are not flattering, we cannot conclude that the article is defamatory. The article generally portrays appellant as an opinionated individual with rather strident views on various political and social issues, views which he expresses in unusual ways. But contrary to appellant's interpretation, the article does not suggest that appellant is clinically mentally ill, a suggestion which would rise to a defamatory level.

For example, appellant focuses largely on what he perceives to be the article's conclusions regarding his attempts to get various violations of law prosecuted. Appellant reads the article as implying that he is delusional in witnessing infractions of the law that no one else can verify. But fairly read,

that portion of the article simply states that the police, unlike appellant, were unable to document violations of law. Appellant also argues that the phrase "his world" can only be interpreted as the world of a delusional madman. But that phrase only suggests that appellant has an individual or unique perspective. Appellant reads too much between the lines. The usual reader would not draw such negative conclusion from the article.

Furthermore, the individual paragraphs and the piece as a whole are reasonably subject to positive readings. For example, appellant takes issue with the statement that appellant does not "just march to the beat of a different drummer, he tries to give drum lessons to the world." But that metaphorical phrasing simply portrays him as an in-

dividual engaging in unfettered self-expression--something of an American archtype (Henry Thoreau and more).

Similarly, appellant suggests that he is characterized as a treasonous subversive by the statements: "it's not the government that's after him--it's he who's after the government," and "Government has become Benigni Enemy No. 1." But these statements only portray appellant as an active participant in public issues and a vocal critic of his government's shortcomings. These are not --we hope-- defamatory qualities.

Finally, appellant charges that the title's reference to him as a "rebel" is defamatory. But being called "a rebel" is not inherently defamatory. This nation was founded by "rebels." Cf. McGarth v. TCF Bank Savings, 502 N.W.2d 801, 808 & n.5 (Minn. App. 1993) ("troublemaker"

not actionable because it lacks precision, fails to suggest verifiable false facts, and is ambiguous; and "troublemaker" may be "commendable"). modified on other grounds, 509 N.W.2d 365, 366 (Minn. Dec.17, 1993).

Furthermore, although much of the article addresses appellant's lack of success in getting satisfactory responses from the government, the article concludes by recounting appellant's dispute with the U.S. postal service in which, having stuck to his guns, appellant finally overcomes the government bureaucracy and obtains satisfactory mail service. Thus, the piece recounts appellant's successes, as well as his failures.

We cannot conclude that the article --in part or in whole--is defamatory. Accordingly, we affirm the summary judg-

ment on the ground that the article simply is not defamatory.[1]

---

[1] Because we conclude that the article as a whole is not defamatory, we need not engage in a line-by-line analysis of the truth or falsity of the individual statements as did the district court. But we note, as did the district court, that most of the statements are not capable of being proven true or false. The article--as a "human interest" piece--lacks the concrete fact-assertive prose style common to journalism. Most readers would not attribute to the article a high degree of factual focus.

II. Discovery

Appellant raises various arguments regarding discovery. But in light of our conclusion that as a matter of law the article was not defamatory, any alleged error regarding discovery was harmless. There is nothing that appellant could have obtained during discovery that would undermine our legal conclusion, which is based on the text of the article.

Affirmed.

Judge Jack Davies
April 19, 1994

STATE OF MINNESOTA

IN COURT OF APPEALS

OFFICE OF APPELLATE COURTS

Kenneth S. Benigni,

JAN 31 1994

Appellant,

FILED

vs.

Cowles Media Company, a Delaware corporation, d/b/a Star Tribune,

Respondent,

Michael Hart,

ORDER

Respondent.

C8-93-2434

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE:

1. Appellant, pro se, mailed the appeal papers in this case on December 1, 1993. The Clerk of the Appellate Courts filed the appeal on December 6, 1993.

2. In the statement of the case,

appellant indicated no transcript is required. Appellant's brief was due on Janurary 5, 1994, which was 30 days after the appeal was filed, see Minn. R. Civ.App. P. 131.01. Appellant's brief was timely mailed on Janurary 5.

3. Respondents move to dismiss the appeal on the ground that appellant failed to file a timely brief. Respondents argue that appellant's briefing period began on December 1, when appellant mailed the appeal papers. Appellant opposes the motions.

4. Filing may be accomplished by mail, and such filing is timely if the papers are deposited in the mail within the time fixed for filing. Minn. R. Civ. App. P. 125.01. But the Clerk of the Appellate Courts cannot actually file the papers until they are received. Where no transcript is required, appell-

ant's brief is due within 30 days after the filing of the notice of appeal. Minn. R. Civ. App. P. 131.01. It is this court's practice to measure the appeal period as starting when the Clerk of the Appellate Courts receives and files the appeal papers, not when the papers are placed in the mail.

5. In this case, appellant's brief was timely filed, and there is no basis for dismissal of the appeal. Even if appellant's brief was a few days late, as respondents contend, dismissal would be an inappropriate sanction because respondents did not establish that they were substantially prejudiced by the late filing. See Progressive Cas. Co. v. Kraavenbrink, 365 N.W.2d 229, 231 (Minn. 1985)(failure to timely file a brief is a technical, nonjurisdictional matter).

6. Respondents also contend the appeal should be dismissed because of appellant's failure to file a cost bond under Minn. R. Civ. App. P. 107. But failure to file a cost bond does not warrant dismissal of the appeal, at least where no predjudice is shown. See Ladwig & Ladwig, Inc. v. Orlin Ladwig, Inc., 372 N.W.2d 408, 411 (Minn. App. 1985).

7. In this case, appellant filed a copy of the district court's November 23, 1993 order granting his motion to proceed in forma pauperis. The district court's November 23 order is sufficent to waive the requirement for the cost bond. See Minn. R. Civ. App. P. 107, subd. 2(d)(no cost bond is required when the trial judge finds that the party is indigent and that no cost bond shall be required in the interests of that

party's right to appeal).

8. Respondents also filed alternative motions for an extension to file their briefs. Respondents' briefs are due on February 7, 1994, which is 33 days after appellant's brief was served by mail on January 5, see Minn. R. Civ. App. P. 131.01, 125.03 A short extension is warranted.

IT IS HEREBY ORDERED:

1. Respondents' motions to dismiss this appeal are denied.

2. Respondents' motions for an extension to file their briefs are granted, in part.

3. Respondents' briefs shall be served and filed no later than February 11,1994.

4. No further extension motions will be entertained.

5. On completion of briefing, this matter shall be submitted for nonoral consideration. See Minn. App. Spec. R.

Pract.2 (if any litigant is without counsel, the case will be submitted on the briefs and record, without oral arguments by any party).

Dated: January 28, 1994

BY THE COURT

Chief Judge

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

KENNETH S. BENIGNI,

Plaintiff,

-vs-

Court File No.
92-16358

COWLES MEDIA COMPANY,
a Delaware corporation,
d/b/a Star Tribune, LARRY
OAKES, and MICHAEL HART,

ORDER

Defendants.

The above-entitled matter came before the Honorable Harvey C. Ginsberg by motions of defendants Cowles Media Co. and Larry Oakes jointly, and defendant Michael Hart individually, on June 4, 1993.Thomas S. Schroeder, Esq., appeared on behalf of Defendants, Cowles Media Company and Larry Oakes; Barbara A. Russ, Esq., appeared on behalf of Defendant Michael Hart. Kenneth S. Benigni, pro se,

appeared on his own behalf. Based upon the files, records, and proceedings herein, this Court issues the following:

ORDER

1. Summary judgment in favor of Defendants, Cowles Media Company and Larry Oakes, is granted.

2. Summary judgment in favor of Defendant, Michael Hart is granted.

3. The Memorandum of Law attached herein is incorporated by reference.

IT IS HEREBY ORDERED:

Plaintiff's complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY

By The Court

Dated: 8/30/93

Judge Harvey C. Ginsberg
Judge of District Court

FINDINGS OF FACT

Defendant Larry Oakes is the Northern Minnesota Correspondent for the Star Tribune. Oakes has reported upon issues concerning northern Minnesota. Defendant Michael Hart is a Captain with the St. Louis County Sheriff's Department. Plaintiff, Kenneth S. Benigni, was the subject of a story published in the Minneapolis Star Tribune entitled: "He's a northern Minnesota rebel with a lot of causes."

Plaintiff brought suit in district court, alleging that the article was defamatory. The article is republished here with the designated paragraph breaks the parties have used in arguing this motion.

1. The large hand-painted signs are the first thing to stir your curiosity. About 40 miles north of Duluth on a sparsely populated stretch

of Hwy. 53 you notice them, nailed high on posts on the highway's east side.

2. One rails against Boise Cascade Corp. and the "biased, truth- and fact- suppressing Duluth and Twin Cities daily newspapers." The other demands the sheriff's resignation, accusing him of protecting "punks, drunks, thieves and other scum."

3. Then you notice, beyond the signs, the ramshackle buildings, the tall fences and what appear to be large cages; the barbed wire and the small sign that says: "Don't step in the bear traps."

4. Before good sense has a chance to overcome curiosity, you meet the landowner, Ken Benigni. He comes walking up warily, scowling, head cocked, eyes squinty. The handle of a pistol pokes out of his back pocket. You make a mental note to start nodding and smiling a lot.

5 "Don't mind the gun -- I've been having some trouble with my neighbors," he says after some pretty fast talking apparently has convinced him that you're not a punk, drunk, thief or other scum. He seems to have graciously overlooked the fact that you're one of those biased truth and fact suppressors.

6. K. Samuel Benigni, 56, may be one

of northern Minnesota's more extreme examples of the human quest for individual expression. He doesn't just march to the beat of a different drummer; he tries to give drum lessons to the world.

7. A dry wall installer and animal dealer who sold hybrid timber wolves in the early 1980s until it got him in trouble with the U.S. Fish and Wildlife Service, Benigni has a stack of lawbooks and several boxes of case files that show he mixes with the government like wolves mix with rabbits.

8. Usually it's not the government that's after him - it's he who's after the government, whether he's chewing out a St. Louis County sheriff's deputy because local hoodlums allegedly are speeding on his road, filing petitions and complaints about a business owner allegedly stealing gravel from a county pit, or haranguing prosecutors in Duluth and St. Paul for hours about alleged wage thefts from him and other construction workers.

9. He brings stacks of pictures of the alleged acts taking place, dozens of cassette tapes of conversations he had with the alleged criminals, and reams of investigative reports and legal briefs, which he researches and writes himself in the tool shed that serves as his home

in the animal compound. His evidence has never been deemed enough, and exasperated public officials have sent him away unsatisfied.

10. Government has become Benigni Enemy No. 1.

11. He's tried writing long letters to the editor, but no mainstream newspaper has published them. Mainstream newspapers have become Benigni Enemy No. 2.

12. He's had trouble seeing eye-to-eye with rural neighbors, some of whom have suggested that big hand-painted sign (sic) are ugly and that caged wild animals smell bad. Those suggestions usually have prompted him to suggest a few things on his own. Now he says they yell nasty things at him out their car windows as they drive by. Neighbors have become Benigni Enemy No. 3.

13. Everything I see around here is a coverup,"Benigni said. "You can't get any action on anything in this county, state or country...And these (expletive deleted) around this town -- the whole place doesn't have a cumulative I.Q. of more than 70. The people of this county are sheep. And they're a bunch of xenophobics."

14. Frustrated after several failed attempts to bring the wrongdoers of his world to justice, Benigni resorted in the 1970s to large signs

along the highway.

15. The very first sign simply said: "Ford is just a 4-letter word." He painted it and nailed it up the day after President Ford pardoned President Nixon. He's still got the newspaper front page commemorating that event pasted on a wall in his shed above his bed.

16. An Ohio native who says he was kicked out of high school at age 17, Benigni said he moved to northern Minnesota in the 1960s in order to raise animals.

17. He said that the billboard about Ford got him national media attention, but that most of the signs since then have dealt with local issues and concerns, and sometimes only his issues and concerns. When a local tavern burned down, the sign said: "Good Riddance."

18. For the past few years the sign space has often been devoted to venting his wrath at the St. Louis County Sheriff's Department, which he said refuses to prosecute traffic violators on the dirt road that runs by his compound.

19. He went to great lengths to document the alleged violations. To try to prove that people weren't stopping at a stop sign, he built a crow's-nest of sorts, wore camouflage, mounted a still camera on top of a video camera and shot pic-

tures of the cars from the crow's-nest. The video camera documented that some of the cars rolled through the stop sign; the still camera got the license numbers.

20. "He brought all of this stuff in, and I spent almost a whole afternoon with him one day," said Capt. Michael Hart of the sheriff's department. Hart said he told Benigni that the alleged violations would have to be witnessed by a deputy to be prosecutable, and promised to post a deputy on the road, with instructions to try to catch violators, during a holiday weekend.

21. "We posted a deputy there on overtime all day -- with instructions to really try to spot violations -- and he didn't even see one," said Hart.

22. Mention Benigni's name at any one of several law enforcement agencies, and the response is something on the order of: "Oh, God, what's he doing now?"

23. Benigni never seems to get too far with public officials, but he doesn't give up. Early this summer the U.S.Postal Service refused to deliver his mail because his mailbox had a bee's nest in it.

23. In true Benigni fashion, he refused to remove the nest. Instead, he persuaded a Duluth television news crew to come to his place, and took

a bite of the nest, which was apparently unoccupied, in front of the camera.

25. The mail began arriving the next day.

MEMORANDUM OF LAW

Summary Judgment Standard

Summary judgment is proper when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R.Civ. P. sec. 56.03. For the purposes of summary judgment, all reasonable doubts and inferences must be resolved in favor of the non-moving party. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

When the moving party has met its threshold burden, the non-moving party cannot successfully resist a motion for summary judgment by "simply show[ing] that there is some metaphysical doubt as to the material facts." Carlisle v. City

of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989). Rather, the burden on one resisting summary judgment is to "provided (sic) the court with specific facts indicating that there is a genuine issue of fact." Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1986).

While always an extreme procedure, summary judgment is more apt to be appropriate in a libel case where considerations of constitutional freedoms arise. Shuster v. U.S.News & World Report, Inc., 459 F. Supp. 973 (D. Minn. 1978) aff'd 602 F2d 850 (8th Cir. 1979). To permit a meritless action to proceed beyond the pleading state to trial would further chill publishers and speakers in the exercise of their first amendment rights. Id.

Truth or Falsity of Article

The elements of a defamation action are publication, falsity, and defamatory meaning. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). The issue of proof of falsity is central to this motion because the Court has been asked to grant summary judgment on the basis that plaintiff has failed to show any of the statements in the article are false. In Minnesota, the burden of proving falsity shifted to the plaintiff after Gertz. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980); Jadwin v. Minneapolis Star and Tribune Co., 390 N.W.2d 437, 440.

To make this determination, the

court must inquire which statements may be considered false for the purposes of libel law. Jadwin, 390 N.W.2d at 440-41. First, only false and defamatory statements are actionable; "There is no such thing as a false idea". Id. at 441 (citing Gertz, 418 U.S. at 339-40, 94 S.Ct. at 3006-07). Expressions of opinions, rhetoric, and figurative language are generally not actionable if, in the context, the audience would understand the statement is not a representation of fact. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970); Letter Carriers v. Austin, 418 U.S.264, 284-86 (1974); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

Second, the plaintiff cannot succeed in meeting the burden of proving falsity by merely showing that the

statement is not literally true in every detail. Jadwin, 390 N.W.2d at 441; Lewis v. Equitable Life Assur. Soc., 389 N.W. 2d 876, 889 (Minn. 1986) (truth goes to the underlying implication of the statement). If the statement is true in substance, inaccuracies of expression or detail are immaterial. Stuempges, 297 N.W.2d at 255-56. "A statement is substantially [true] if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced". Jadwin, 390 N.W.2d at 441 (citing Williams v. WCAU-TV, 555 F.Supp. 198, 202 (E.D. Pa. 1983); Prosser and Keeton on the Law of Torts sec. 116 at 842 (5th ed. 1984 and Supp. 1988). Unless they are alleged to have been used and understood in a different sense, words must be constructed with their obvious and

natural meanings. Jadwin, 390 N.W.2d at 442. Where there is no dispute as to the underlying facts, the question of whether a statement is substantially accurate is one of law for the court. Id. at 441.

The Court will determine the truth or falsity of the article as it was broken down by the parties in Defendant's brief. (also see Plaintiff's October 15, 1990 letter to Dave Hoium, Defendant Cowles Media Exhibit 62).

Plaintiff has not contested the substantial truth of paragraph 1.

Paragraph 2 is completely true. (Defendant Cowles Media, Exhibits 8 & 9).

Paragraph 3 misquotes plaintiff's sign. That words "don't step in the bear traps" is what appeared in the article. The actual words of plaintiff's sign were "don't step in bear traps". (Def-

endant Cowles Media, Exhibit 9). Though the sign was misquoted, the gist of the actual sign would imply to a reasonable reader that there are perhaps bear traps around plaintiff's property and one should not attempt to trespass. The quote is therefore substantially true, and the addition of the article "the" was merely an attempt to correct plaintiff's syntax. The reference to plaintiff's buildings as "ramshackled" is substantially true since plaintiff has acknowledged that several of his buildings were damaged and has referred to the area around his home as a "ghost town". (Defendant Cowles Media, Exhibit 62). The article's description of the buildings as ramshackled also is clearly fair comment on a public record of the U.S.Fish And (sic) Wildlife Service. (Defendant Cowles Media, Exhibit C).

Furthermore, to be defamatory, the statement must be about the person. Britton v. Koep, 470 N.W.2d 518, 520 (Minn. 1990). This language quotes a sign and makes no statement about plaintiff.

Paragraph 4 is merely stating a perception that Oakes had as he was approached by the plaintiff. That perception is incapable of verification. Nor does plaintiff present any evidence, either in his affidavit or otherwise, that the posture and gestures attributed to him were false. Moreover, there is nothing defamatory about scowling at a stranger.

In regard to the gun, plaintiff states that he had a gun sticking out of his pants when he meet (sic) Oakes. (Complaint para. 52; see also Plaintiff's deposition p. 494, line 20-25).

The quote in paragraph 5 is admitted to be substantially true by plaintiff although plaintiff claims the quote trivializes the truth about his "trouble" with the neighbors. (Complaint para. 53; Plaintiff's deposition p. 494-95). While a death threat may trivialize "trouble" with one's neighbors, when a person is getting death threats from someone who lives in relatively close proximity to him, he is clearly having trouble with his neighbors. Moreover, plaintiff testified in his affidavit that his statement to Oakes was something to the effect of: "Don't worry about the gun. I've had a lot of trouble around here." (Plaintiff's deposition, p. 494-95). Thus, the article quote is substantially true. Plaintiff does not dispute the truth of the remaining portion of the paragraph.

The second sentence in Paragraph 6 is merely figurative language. See Jadwin, 390 N.W. 2d at 441; Greenbelt, 398 U.S. at 13-14. The truth as to the remaining portion of the paragraph is not disputed.

The gist of Paragraph 7 suggests that plaintiff is or has been an animal dealer. The truth of this statement is found in the fact that plaintiff admits he sold timber wolves until 1984. Moreover, calling someone an animal dealer is not defamatory. 50 Am Jur 2d, Libel and Slander sec. 86.

Plaintiff's trouble with the U.S. Fish and Wildlife Service is established by the Service's Notice of Violation dated April 8, 1992 (sic), (Defendant Cowles Media, Exhibit 4) and the Decision of the ALJ assessing a $3,000.00 fine (later reduced to $750.00 (Id. Exhibits 5-7). This is merely fair and accurate

comment on a public record and is subject to a qualified privilege. see Jadwin, 390 N.W.2d at 441; also see Kletschka v. Abbot-Northwestern Hosp., 417 N.W.2d 752, 755 (Minn. Ct. App. 1988) ("Whether an occasion is a proper one upon which to recognize a privilege is a question of law for the court to determine.") The remaining portion of the paragraph is merely hyperbole and cannot be proven true or false. Supra Greenbelt.

In Paragraph 8, Defendants made a fair and accurate comment on matters of public record which evidence plaintiff having "Chew[ed] out a . . . deputy". (Defendant Cowles Media, Exhibit 14 (plaintiff "more or less called me a liar"), and also 34, 10, and 17).

Plaintiff objects to the use of the word "haranguing" in describing his 6 hour conversation regarding wage thefts.

It is impossible to objectively verify or disprove what actions would amount to "haranguing" making this word choice rhetorical hyperbole. Supra Greenbelt; See also Plaintiff's analogy given at the top of page 18 of Plaintiff's Responsive brief.

Paragraph 9 depicts plaintiff's home as a tool shed in an animal compound. The zoning report of St. Louis County Planning Commission described plaintiff's living quarters as "a tool storage-residence building". (Exhibit A attached to Schroeder Affidavit). In addition plaintiff admits that his house is situated 100 feet from the animal yards within an enclosed area and that tools and machines lie in full view from his living quarters. This description substantially fits the definition of a tool shed residence in an animal compound. To the extent

that it exaggerates the true condition of plaintiff's residence it is merely truculent rhetoric. That plaintiff has been sent away unsatisfied is substantiated in paragraph 19 of plaintiffs (sic) Complaint. (See also Defendant Cowles Media, Exhibit 36 and 54).

Paragraph 10 is merely hyperbole incapable of verification. Supra Greenbelt.

Plaintiff does not contest the fact that he sent a copy of "Odyssey to Justice" to the media in hopes of getting it published. (Plaintiff's deposition p. 422). Whether "Odyssey to Justice is labeled a manuscript or a letter, it is over 20 pages long, was sent to the editor for publication, and was rejected by both the Star Tribune and Pioneer Press. The statement is substantially true. The remaining portion of paragraph

11 is rhetorical hyperbole. Supra Greenbelt.

Paragraph 12 is substantiated by Defense Exhibits 77 and Exhibit 14. This is a fair and accurate report on public records. Supra Jadwin. The remaining portion of the paragraph is rhetorical hyperbole. Supra Greenbelt.

The substantial truth of paragraph 13 is not challenged by plaintiff. (Plaintiff's responsive brief, p. 22)

The substantial truth of paragraph 14 is admitted in paragraphs 13 and 54 of plaintiff's Complaint.

Webster's New World Dictionary provides as an example of the word "paste": "to paste a wall with posters". (2nd College Edition 1968). While "tack" would have been more technically correct, "paste" is substantially true. Depicting plaintiff's house as a shed, while un-

flattering, is substantially true or a mere exaggeration. (Supra Re: Paragraph 9). The gist of paragraph 15 is true.

The truth of Paragraph 16 is not in contention. (Plaintiff's Responsive brief at page 22).

Paragraph 17 is substantially true. (See Defendent Cowles Media, Exhibits 2, 3, 8-11

Paragraph 18 is sudstantially true. (Defendant Cowles Media Exhibits 2, 3, 8).

The truth of Paragraph 19 is substantiated by plaintiff (sic) unrefuted sworn deposition testimony. (Plaintiff's deposition p. 488 - 491). The most interesting part of this paragraph is that it is a vindication of plaintiff's traffic violator claims. Plaintiff's brief is rife with the complaint that the article failed to disclose the myriad of doc-

umentation plaintiff has of traffic violations. This paragraph acknowleges that vehicles were in fact not stopping at the stop sign.

Paragraph 20 cannot be proved false merely because Hart expressed his opinion that a traffic offense needs to be observed by an officer to be prosecutable. While this statement may or may not be technically true, that is not the issue. Whether to issue a citation and proceed to prosecute an offense is an excercise of discretionary judgment and must be made by the officer viewing the alleged evidence. An officer may chose not to issue a citation based upon a video tape if he believes the evidence would be insufficient to get a conviction or for other reasons. The fact that this is a judgment call puts this statement under the rubric of an opinion. See Milkovich

v. Lorain Journal Co., 497 U.S. 1, 21 (1991).

Paragraph 21 is incorrect to the extent that the deputy saw 3 violations and issued 3 warning tickets. While these statements are false, they are not about plaintiff. Statements must be about the plaintiff to be defamatory. Britton, 470 N.W.2d at 520. Here the statements are about traffic violators.

Paragraph 22 is couched in language which is not literally what law enforcement employees say. Moreover, plaintiff has not offered any evidence that such a statement was not made to refute Oakes' Affidavit testimony. To the extent it may not be true, it's merely rhetorical hyperbole.

Paragraph 23 is substantially true. (Cowles Media Exhibits 52-56).

Paragraph 24 is substantially true.

(Cowles Media Exhibit 78).

Paragraph 25 is not contested by plaintiff.

Thus, the only paragraph which was not true was not about plaintiff and therefore, not defamatory.

Defamation by Innuendo

Plaintiff argues in his brief that the article defames him by innuendo. Defamation by innuendo occurs when a statement is made that is not on its face defamatory; however; when combined with extrinsic facts, gives rise to a defamatory innuendo. The extrinsic facts are known as the inducement, and the defamatory meaning as the innuendo.

"When the defamatory meaning arises only from the facts not apparent upon the face of the publication, the plaintiff has the burden of pleading and proving such facts, or inducement." Anderson

v. Kammeier, 262 N.W.2d 366, 371 (Minn. 1977). As shown above, there is no defamatory meaning apparent upon t face of the publication. Plaintiff has also failed to plead facts which would establish a defamatory innuendo. The evidence which plaintiff has produced does not establish any form of innuendo.

Assuming argendo, plaintiff has pled innuendo, which he seems to think is "plaintiff is [a fool] (Plaintiff Responsive brief, p. 20, 23, 24), [mentally incompetent] (Plaintiff Responsive brief, p.20, 24-25), [mental case] (Plaintiff Responsive brief, p. 26), [nut] (Plaintiff Responsive brief, p.28), [the town crazie] (Plaintiff Responsive brief, p. 28), plaintiff (sic) lawsuit still would not withstand a motion for summary judgment.

Even if a reasonable reader would

understand the article to be implying plaintiff is a "nut" or "fool", calling someone a "nut" or "fool" is not actionable. Leidholdt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988); Kryeski v. Schott Glass Technologies, 626 A.2d 595, 601 (Ill. 1993; Haberstroh v. Crain Publications, Inc.,189 Ill. App. 3rd 267, 272, 545 N.E.2d 295, 298; Thomas v. News World Communications, 681 F. Supp. 55, 63 (D.D.C. 1988); McGowen v. Prentice, 341 So.2d 55 (LA App. 1976). This type of name calling is merely an opinion and does not give rise to a cause of action for defamation. Although this article may have been less than kind to plaintiff, the abuse plaintiff alleges is not so obviously and naturally harmful as to constitute libel per se.

This is not to say that calling someone insane or mentally ill as those

words are technically understood could not be actionable. The distinction is whether the reasonable reader would understand the article to be expressing facts. No reasonable reader would understand the article to suggest that the plaintiff is mentally ill, clinically paranoid, or mentally incompentent as those words are used to describe a medical or psychiatric condition. It strains credulity to accept that the article portrayed plaintiff in this manner.

Defamation by Implication

Plaintiff has not pled defamation by implication. Moreover, the basis of this theory is that the article is true, which plaintiff unabashedly denies.

Statute of Limitation

Given the above determination, it is unnecessary to address Defendant Hart's Statute of Limitation defense.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

KENNETH S. BENIGNI,

Plaintiff,

vs

COWLES MEDIA COMPANY, a Delaware corporation, d/b/a Star Tribune, LARRY OAKES, and MICHAEL HART,

Defendants.

JUDGMENT

Date:
September 3, 1993

JUDGMENT ROLL

File No 92-16358

This cause having been regularly placed upon the calendar of the above named Court, came on for hearing on the 4th day of June, 1993, upon motions of Defendants Cowles Media Co. and Larry Oakes jointly, and Defendant Michael Hart individually, for summary judgment, and the Court, after hearing the arguments of counsel and being advised in the premises, did, on the 30th day of August, 1993, duly make and file its order granting said motion and for

judgment herein.

Now, pursuant to said order and on motion of Thomas S. Schroeder, Esq., Attorney for the Defendants Cowles Media Company and Larry Oakes; and Barbara A. Russ, Esq., Attorney for the Defendant Michael Hart,

IT IS HEREBY ADJUDGED:

1. Summary judgment in favor of Defendants, Cowles Media Company and Larry Oakes, is granted.

2. That the Defendants, Cowles Media Company and Larry Oakes, have and recover of the Plaintiff the sum of _____ _____ Dollars, costs and disbursements as taxed and allowed herein.

3. Summary judgment in favor of Defendant, Michael Hart, is granted.

4. That the Defendant, Michael Hart, have and recover of the Plaintiff the sum

of _____ Dollars, costs and disbursements as taxed and allowed herein.

5. That the Memorandum of Law filed on the 30th day of August, 1993, be, and hereby is, incorporated herein.

BY THE COURT

DISTRICT COURT ADMINISTRATOR

BY_____
DEPUTY

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

KENNETH S. BENIGNI,

Plaintiff,

-vs-

Court File No.:
92-16358

COWLES MEDIA COMPANY,
a Delaware corporation,
d/b/a Star Tribune, LARRY
OAKES, and MICHAEL HART,

ORDER

Defendants.

The above-entitled matter came on by paper submission before the Honorable Harvey C. Ginsberg on October 15, 1993. Thomas S. Schroeder, Esq., filed a brief on behalf of Defendants, Cowles Media Company and Larry Oakes; Barbara A. Russ, Esq., filed a brief on behalf of Defendant Michael Hart. Kenneth S. Benigni pro se, filed a brief on his own behalf. Based upon the files, records, and pro-

ceedings herein, this Court issues the following:

ORDER

1. Plaintiff's motion for reconsideration/rehearing is denied.

2. The Memorandum of Law attached herein is incorporated by reference.

IT IS HEREBY ORDERED:

Dated; 10/25/93

By The Court

Harvey C. Ginsberg
Judge of District Court

MEMORANDUM OF LAW

The Court may grant relief from a final judgment in the event of (a) Mistake, inadvertence, surprise, or excusable neglect; (b) Newley discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03; (c) Fraud (whether heretofore denominated intrinsic or extrinsic). misrepresentation, or other misconduct of an adverse party; or (f) Any other reason justifying relief from the operation of the judgment. Minn. R. Civ. P. 60.02 (a), (b), (c) and (f).

Plaintiff has failed to specifically allege any form of "mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; [or] fraud" which would require the vacation of the judgment. Rather, Plaintiff's motion

tends to merely reiterate his previously submitted arguments.

First, the semantic distinctions between the words Plaintiff has chosen to describe the incident in question and the words which the court and the other parties have chosen fails to rise to the level of "mistake." (Memorandum In Support of Kenneth S. Benigni's Motion to Vacate or Amend Order, Order a New Hearing on all of the Issues, or in the Alternative, for Relief from Judgment at page 2.)

Second, the above referenced semantic distinctions did not occur as a result of "inadvertence." It is apparent that both the newspaper and the court have taken care with their choice of language and have used it intentionally. Third, Plaintiff is in no position to argue surprise in this instance because,

as defense counsel has pointed out, Plaintiff did not initiate discovery proceedings until a few weeks before the discovery deadline. The facts of this case have been well known to Plaintiff for over two years. Plaintiff has suffered no surprise that would be sufficient grounds for granting a Rule 60.02 (a) motion.

Fourth, the provision for excusable neglect in Rule 60.02(a) does not apply to Plaintiff's situation. Rather, it is meant to provide relief for the movant who has, through accident or error, neglected to take some legitimate legal action or failed to respond to a complaint or a motiom. Avers v. Rudolph's Inc., 392 N.W.2d 647 (Minn. App. 1986).

Fifth, Plaintiff has failed to allege any newly discovered evidence or fraud. Finally, Plaintiff has failed to

allege "any other reason justifying relief." Consequently, because Plaintiff has failed to satisfy any of the permissible grounds for granting a Rule 60.02 motion to vacate, Plaintiff's motion is denied.

[Excerpt from Plaintiff Kenneth S. Benigni's Response to Defendants Cowles Media Company; Larry Oakes; and Michael Hart's Motions for Summary Judgment, No. II, (General Statement) at p. 2, (6/14/93)]

"The media Defendants talk at length with great pomposity about the needs of the media for breathing space. Yet, in the article at issue, the media was breathing fire. They talk about the chilling effect to First Amendment rights resulting from libel actions against media defendants, yet they would freeze to death the people's First Amendment rights to freedom of speech. They are perfectly willing to destroy a citizen's reputation, his means of livelyhood, his hopes and dreams and his efforts to obtain law enforcement and redress to his grievances, simply because he criti-

zed them or public officials or merely reported a theft or death threat or other law violation to the police. If this isn't journalistic terrorism, then up is down. What reasonable citizen would risk reporting a crime or provide evidence or testimony of a crime when faced with these sorts of reprisals? This is more than a chilling effect, this is a killing frost."

* * *

[Plaintiff's Resp. Br. (6/14/93)(supra) (Re: Michael Hart) at p. 27.]

"Plaintiff feels there is more than enough actual malice to go around, however, Hart was at the very least negligent when he didn't search his files before responding to Oakes' questions, especially knowing that he has a faulty memory." * * *

[Excerpt from Memorandum in Support of Plaintiff Kenneth S Benigni's Motion to Vacate or Amend Order, Order a New Hearing on All of the Issues, or in the Alternative, for Relief From Judgment, (Argument) at p. 2, (9/14/93)]

"Plaintiff being a private figure and the article not being about a matter of public interest (exposing crime and corruption may well be a matter of public interest, but deliberately concealing evidence of crime and corruption and discrediting honest witnesses certainly is not), the Defendants must prove truth, which they wholly failed to do. Ultimately, Plaintiff would not have to prove actual malice, although he is co - fident he could, but only negligence. ...This article was not fair, truthful

or unbiased journalism. This was plainly a sadistic abuse of media power against a law-abiding citizen using his freedom of speech in trying to obtain law enforcement and justice in self defense.

The Supreme Court gave the N.Y.Times standard/privilege to the media so they would have the freedom to expose crime and corruption or wrongdoing or dereliction of duty by public officials in a way beneficial to the public interest.

Certainly that privilege was not given to the media so they could aid and abet the commission of crime, or the dereliction of duty by public officials by deliberately helping crimes to be covered up by suppressing the disclosure of evidence and by assassinating the character and credibility of a witness to those crimes with falsehoods and

twisted words; or to prevent citizens from obtaining law enforcement or their wages or relief from death threats; or to retaliate against a citizen for using his First Amendment right to freedom of speech; or to rule the people by the threat of character assassination if they dare make a comment the media or authorities do not like.

To allow this to occur is unconscionable and surely cannot be what the Supreme Court intended the N.Y.Times standard to accomplish.

There are two factors that distinguish this case from all the others:
No. 1 Here the media was helping criminals to continue their criminal activities.
No. 2 Here the media was using its First Amendment right of freedom of the

press to suppress a citizen's right of freedom of speech.

Allowing the media to get away with such outrages is unconscionable, and cannot possibly be the result the Supreme Court intended in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and would set a precedent that can only be termed disasterous.

* * *

[Excerpt from Notice of Appeal, (12/1/93) (Statement of the Case of Appellant) at p.1.1

"It is plaintiff's claim that the defendants deliberately withheld material facts, the article contained material false statements, and its purpose was intended to silence plaintiff and suppress his evidence of crime and corruption by discrediting both with a character assassination of plaintiff. Essen-

tially, to suppress plaintiff's first amendment right of freedom of speech with the media's first amendment right of freedom of the press.

* * *

[at p.3]

"...appellant respectfully submits that inasmuch as this case involves media defendants using their first amendment right of freedom of the press to suppress a private figure plaintiff's first amendment right of freedom of speech, and to suppress his evidence of crime and corruption, which flies in the face or the purposes of the N.Y. Times actual malice standard, it is one of wide application and precedential value and as such should be weighed and resolved by the entire court with oral argument.

* * *

[Excerpt from Star Tribune's Clarification of Appellant's Statement of Case, (12/13/93) at p.1.]

"Contrary to Appellant's statement, Appellant has not been held to be a "private figure" for purposes of applying the appropriate fault standard."

* * *

[Excerpts from Appellant's Brief, (Statement of the Case) (1/4/94) at p.4.]

"It is Plaintiff's claim that the Defendants deliberately withheld material facts, the article contained material false statements, and its purpose was intended to silence Plaintiff and suppress his evidence of crime and corruption by discrediting both with a character assassination of Plaintiff. Essentially, to suppress Plaintiff's First Amendment right of freedom of speech with the

media's First Amendment right of freedom of the press."

* * *

[In Appellant's Brief, (Arguments) at p.18.]

"These derogatory statements were not isolated little bits of hyperbole or innocent mistakes, it was a vicious character assassination from start to finish, all the more reprehensible because it was an attempt to discredit an honest citizen and his evidence of crime and corruption by suppressing his First Amendment right of freedom of speech with the media's First Amendment right of freedom of the press, which flies in the face of the purpose of the New York Times privilege."

* * *

[In Appellant's Brief, (Arguments) at p.20.]

"PRIVATE FIGURE-- NO PUBLIC CONCERN"

"'A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the New York Times protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest.' Gertz v. Robert Welch, Inc., 418 U.S.323 (1974). 'Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.', Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767,768 (1986).

Plaintiff was a private figure. Defendants pretend that he was a public figure, however, the District Court never ruled on or considered that issue.

Moreover, Plaintiff erected his signs precisely because he had no access to the media, or to law enforcement concerning thefts, and was robbed to such a degree that he had to proceed on this appeal pro se, in forma pauperis. Not exactly a counterpart to Elizabeth Taylor.

The article also did not involve a matter of public concern. While it is undisputed that the disclosure of crime and corruption is a matter of public concern, the exact opposite, the discrediting of a witness and his evidence of crime and corruption is the antithesis of public concern. Moreover, the article was about Plaintiff; Plaintiff is <u>not</u> a matter of public concern. Holding that Plaintiff, a private figure, was a matter of public concern, would subject every private person to character

assassination at the whim of any reporter. 'In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest in preserving private reputation adequately supports awards of presumed and punitive damages -- even absent a showing of actual malice.' Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S.749 (1985)(Quoted in Philadelphia Newspapers, Inc. v. Hepps, at 774)(supra).

Therefore, Plaintiff is only required to prove negligence, not actual malice. Moreover, Hart is not a media defendant and cannot claim any protection from the New York Times privilege in any case. That is not to say that Plaintiff cannot prove actual malice, it just isn't critical at this point."

* * *

[Excerpts from Brief of Respondents Star Tribune and Larry Oakes, (Argument) (2/4/94),at p.45.]

"More importantly, the validity of Appellant's evidence is not the point. The article is not about gravel thefts and traffic violations in Cotton, Minnesota. Instead, the article is about the unique reaction of a man toward the crime and corruption he perceives around him, and about society's reaction toward this man.

Whether Appellant's evidence is "valid and solid" makes no difference to this, the articles' main subject. It may be true that Mr. Benigni has captured several motorists on film rolling through or ignoring entirely the stop sign near his home -- and indeed, the article states this. App.S.R. at 1 (para. 19). But that fact would not alter the impression of Mr.

Benigni which readers otherwise gain from his unique attempts to document these alleged violations. See Res. Ap. at 410-411 (Depo.)(Appellant mounted a 35mm camera onto a video camera, dressed in camouflaged shirt, pants and sneakers, pulled a camouflaged sleeve over his face, stuffed branches into this mask, and sat high in a tree along the highway for hours with his cameras poised). Cf. App. S.R. at 1 (article describing same). Similarly, the average reader may or may not believe -- as Appellant's billboard once proclaimed -- that the Sheriff of St. Louis County was protecting 'punks, drunks, thieves and other scum' such as Appellant's neighbor and nemesis Ted Tommaro. But whatever the case, the readers' impressions of Mr. Benigni himself will be influenced far less by the truth or falsity of Mr. Tommaro's gravel-stealing

than by Mr. Benigni's unusual efforts to bring this man and his associates to justice. See Res. Ap. at 194-204 (Depo. Exs. 53-56)(letters and portions of the 'exhibits' which Mr. Benigni sent to Congressman Oberstar, Senators Durenburger and Boschwitz, and President Bush) id. at 85 (Depo. Ex. 8 [top] (hand-painted billboards along the highway in front of his home).

In sum, to the extent that the article conveys the defamatory gist Appellant complains of -- that he is a 'nut' or 'fool' with 'no credibility' whatsoever -- that gist stems chiefly from the article's factual and demonstrably true portrayal of Appellant's own conduct. Appellant's 'evidence' makes no difference to this gist, because the gist would not change in the mind of the average reader even if it could be determined

that Appellant's evidence is 'valid and solid,' See Jadwin, 390 N.W.2d at 442 ('a statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.')"

* * *

[Excerpts from Brief of Respondents Star Tribune and Larry Oakes, (Argument) (2/4/94), at p.47.]

Respondents brought their motion for summary judgment primarily on the basis of truth and suggested that the lower court could defer consideration of the fault issues until after resolution of the truth issues. Respondents therefore did not address whether Appellant was a public or private figure, other than to respond to the allegations in Appellant's Complaint regarding consti-

tutional malice. See Res. Ap. at 442; 472, (Defendant's Summary Judgment Memorandum at 1 n.1, 31). Accordingly, the lower court did not rule on or even address the fault issue or Appellant's status, since it held that the statements contained in the article were either true or not actionable. Therefore, while Respondents vigorously dispute Appellant's claim to private figure status, [31] the issue is not properly before the Court. If the Court nevertheless feels compelled to reach the fault issue, Star Tribune requests the opportunity to provide the Court with additional briefing on this issue."
(foot note omitted)

* * *

[Excerpt from letter circulated to the Minnesota Court of Appeals judges at request of media Defendants, (2/17/94) at p.1.]

"The decision in Carradine impacts this appeal in two respects. First, it establishes that Captain Hart's statements (as quoted in paragraphs 20 and 21 of the article) to Oakes were at least qualifiedly privileged. Because Hart's statements were privileged (absolutely or qualifiedly), Oakes' and Star Tribune's substantially verbatim republication of those statements are also privileged."

* * *

[Excerpt from Appellant's Reply Brief, (Argument) (2/24/94), at p.10-12.]

"Although They Have Brought up the Issue of Privilege, the Media Defendants Have Lost Their Privilege Under the N.Y.Times Rule by Abuse of the Purpose for that Privilege."

"The media Defendants' character assassination of, and assault on Plaintiff in the article at issue for his re-

porting and advising of crimes and corruption was antithetical to the principle upon which the N.Y.Times rule/privilege was founded. In New York Times Co. v. Sullivan, 376 U.S. 254, the Court said: 'Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' The necessity of uninhibited, robust, and wide-open speech to the interest of a free society has been stressed over and over again by the United States Supreme Court, including in: Gertz v. Robert Welch, Inc., 418 U.S. 323 at 340, and in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 at 783, fn.3.

If crime and corruption are public issues and, the N.Y.Times rule/privilege was provided to the news media for the purpose of assuring that debate on public issues should be uninhibited, robust and wide-open, then it logically follows that any effort by any member of the news media to suppress, inhibit, or interfere with any debate or any person's speech on public issues (regardless of whether they are also his personal issues, or whether anybody is listening to him or not) is antithetical to the purpose of the N.Y.Times privilege. The privilege is therefore abused, and therefore lost. Lost before the matter of proving that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false is reached. The Restatement of the Law (Second) of Torts, Sec.603 states: 'One

who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest of which the protection of which the privilege is given.'

Thus, the defamation action would revert back to common law standards, and defendants would be required to prove the truth of their statements.

Media Defendants made obvious attempts to, or did suppress, inhibit, or interfere with Plaintiff's speech as spoken, or written on his signs, or otherwise advising of crime and corruption inter alia, in the article at issue, which would have the natural and proximate effect of suppressing, inhibiting, or interfering with the debating of, or investigating of his claims or accusa-

tions and the redress of his grievances. The article was not only a character assassination of Plaintiff, but an assault on the principle that debate on public issues should be uninhibited, robust, and wide-open, and on all citizens' right to freedom of speech. That policy is continued through their brief. They, in fact, aided and abetted the commission of further criminal acts (the logging off of Plaintiff's trees in 1992/1993 by Todd Tammaro)(PX 74-76) by interfering and inhibiting Plaintiff's attempts to secure law-enforcement; and they were, in fact, accessories after the fact, and perhaps accessories before the fact, relative to criminal acts occurring after the article was published. They have therefore abused the purpose of the N.Y.Times privilege and have lost it, the standards of common law apply and,

the burden is on the media Defendants to prove the truth of their statements, not on Plaintiff to prove falsity. (see also App. Ap. at 144,145,90)(App. Br. at 21)"

* * *

[Excerpt from Petition for Review of Decision of Court of Appeals,(Statement of Legal Issues and Their Resolution by the Court of Appeals)(5/25/94] at p.2.]

"Additionally, by brief, and by letter circulated to the Court of Appeals, media Defendants raised the issue of privilege, inter alia, to which Plaintiff responded in his reply brief, essentially, that inter alia: The Media Defendants have Resorted to the Glorification of Theives and the vilification of Plaintiff, and; The Media Defendants have Lost Their Privilege Under the N.Y.Times Rule by Abuse of the Purpose for that Privilege.

The Court of Appeals made no reference whatsoever to the new matters and issues addressed in Appellant's brief."

* * *

[Excerpts from Plaintiff Kenneth S. Benigni's Response To Defendants Cowles Media Company; Larry Oakes; and Michael Hart's Motions for Summary Judgment, No. II, (Argument)(re: Michael Hart) (6/14/93) at p.27.]

"Concerning the issue of fault, Hart's attorney, Barbara Russ argued at the June 4, 1993 motion hearing that in rela- to Hart, the standard of fault should be actual malice. She overlooks the fact that Michael Hart is not a media defendant. Secondly, Plaintiff is not a public person. Plaintiff has no access to the media aside from the libelous article at issue, he has no access to law enforcement. He, in fact, has less rights than

a fish. It is a fact that SLC [St. Louis Co.] deputies have been sent out to make sure Native Americans weren't spearing/ killing any fish illegally while death threats to Plaintiff are ignored.

Plaintiff's signs do not make him a public figure. The signs were for the most part erected in self defense and the others amounted to nothing.

The Court in Tavoulareas v. Piro, said:

> Individual does not forfeit full protection of libel laws and become a limited purpose public figure merely by stating position on controversial issue, if he or she is not principal participant in debate or is likely to have much effect on its resolution.

Plaintiff feels there is more than enough actual malice to go around, however, Hart was at the very least negligent when he didn't search his files before responding to Oakes' questions, especially knowing that he has a faulty memory."

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[Excerpt from Affidavit of Michael Hart, par. 4, (May 5, 1993)]

"...The statement in the Star Tribune article about the Plaintiff "we posted a deputy there on overtime all day -- with instructions to really try to spot violations -- and he didn't even see one," is not precisely accurate because a deputy did warn three individuals who had not come to a complete stop at the intersection being observed...."

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